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No. 91-1225

In the Supreme Court of the United States

October Term, 1991

MIDNIGHT SESSIONS, LTD. t/a AFTER MIDNIGHT, BAKER OCEAN, INC. t/a DOWN SOUTH, GOOD TIMES CAFE, INC., DONALD R. WELCH, SALLY HUNTER, JACK MANOFF, RICHARD SINGER and CURT E. HEIDINGER,

Petitioners,

vs.

CITY OF PHILADELPHIA,

Respondent.

BRIEF OF RESPONDENT, CITY OF PHILADELPHIA, IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

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1. Where pursuant to a licensing statute which provides that no license to operate a dance hall shall be issued unless the premises is a "safe and proper place," and the Police Department in making its licensing recommendation relies on its own experience in public safety matters, and also questions neighbors about their position regarding the dance hall and any reasons for their opposition, and where an administrative review board after full hearing refuses to issue the license because of the opposition of the Police and neighbors, citing the reasons for that opposition, is there any denial of the applicant's right to substantive due process?

2. Where a statute clearly provides that a dance hall must obtain a Dance Hall License before opening, and that in order to obtain a license the facility must be a "safe and proper place for the purpose for which it shall be used ...," and where full administrative and judicial review is available with all procedural safeguards including the right to counsel, the right to cross-examine witnesses, and the right to a written record giving reasons for denial of the license, is an applicant denied procedural due process because it was not expressly informed that residents who live near the proposed facility will be questioned by Police as part of their investigation process even though the applicant could have learned of this procedure by examining the records of past license hearings?

3. Is there a compensable taking where a lessee, having renovated a building for multiple uses, fails to receive a license which he knew was required for one of those uses, but all other uses remain economically viable?

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OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit (Greenberg, J.) has been reported, but the citation given by Petitioners is incorrect. The correct citation is 945 F.2d 667 (3d Cir., 1991).

COUNTER-STATEMENT OF THE CASE

The Opinion of the Court of Appeals presents an accurate description of the statutory and factual matrix which underlies this action. We therefore limit our Counter-Statement of the Case to correcting several serious misstatements and omissions in Petitioners' Statement of the Case.

In implementing the Pennsylvania Dance Hall Act, 53 P.S. §4731 *et seq.*, the City of Philadelphia requires its Police Department to investigate each application for a license so as to determine whether the proposed facility is a "safe and proper place for the purpose for which it shall be used." 53 P.S. §4736. (127a) (All page references are to the Appendix for Petitioners.) This determination is separate and distinct from questions of compliance with other City codes, such as fire and building codes, and is one which the Police are uniquely qualified to make.

In the case of Petitioners' establishment known as "After Midnight," the Police Department recommended to the Department of Licenses and Inspections (hereinafter "L&I") that Petitioners' application for a dance hall license be denied. At the time this recommendation was made, the Police had actually witnessed the problems caused by After Midnight's operations. This was because for a short time the club was open illegally, prior to receiving its license. The record before the trial court was replete with examples of the serious adverse impact on the community resulting from these operations, all of which are summarized in the Court of Appeals' Opinion. (6a)

Many of the problems witnessed by Police and neighbors had, in fact, been anticipated by members of the community and expressed to police in the months prior to After Midnight's license application. (6a) These problems, for example, noise, disorderly conduct, drinking and drugs, vandalism and traffic congestion, were again identified by neighbors when they were questioned by Police as part of the license investigation. Thus, not only did the Police know from their own observations the problems caused by After Midnight's operation, but they were able to as-

certain that the opposition consistently voiced by neighborhood residents was based on an accurate perception and understanding of the nature of the club's business.

Acting on the Police Department's recommendation, L&I denied After Midnight's application for a Dance Hall License. Petitioners immediately appealed and received a full hearing before the Licenses and Inspections Board of Review (hereinafter the "Board of Review") only 11 days after the initial license denial. At the Board of Review hearing, Petitioners were represented by counsel, had the right to call whatever witnesses they chose, and to cross-examine any adverse witnesses. Testimony by the Police was that very loud music came from the club during its operations, a fight involving over 100 males had occurred, drug arrests had occurred in the immediate vicinity of the club, and there was severe traffic congestion. Numerous members of the community testified as to the bases for their opposition, in particular their fear of increased noise, traffic congestion, the sale of drugs and alcohol, vandalism, and disorderly conduct. The complete transcript of this hearing was admitted into evidence at trial.

At the close of the Board of Review hearing, the Board gave explicit reasons for its affirmance of L&I's denial of the license:

> "The Review Board indicated that the neighborhood testimony was unanimous, unwavering, and we are persuaded by the problems that seem to have arisen since the dance hall began operation in May." (7a)

With respect to the establishment known as "Down South," the Court of Appeals has quite correctly pointed out that at the time of the denial of

Petitioners' Dance Hall License application, the establishment had also been denied a Certificate of Occupancy and was not in compliance with the City Fire Code at any relevant time. (9a)

Procedurally, After Midnight appealed the Board of Review's decision to the Court of Common Pleas, but later withdrew that appeal. In the case of Down South, Petitioners did not even appeal the L&I decision to the Board of Review.

The short excerpts of trial testimony selected by Petitioners for inclusion in their Appendix show that the means were available to Petitioners to learn the nature of the Board of Review proceedings and the factors which would be considered by the Board. (190a) The testimony also showed that the review process carried out by the Board clearly distinguished between groundless neighborhood opposition and opposition which was based on valid reasons articulated to the Board. (192a)

SUMMARY OF ARGUMENT

Delegating to the Police Department the duty to determine if a facility is a "safe and proper place" for a dance hall is rational, given the Police Department's special knowledge and experience with matters of public safety. The Police practice of asking members of the community whether they oppose the license, and if so why, is also rational and not arbitrary, and certainly does not constitute a denial of substantive due process where the Police retain the final authority to recommend for or against the license, and the Board of Review retains final administrative authority to grant or deny a license. In this case, the Police had first-hand knowledge of the adverse impact caused by Petitioners' dance hall on the community's safety and welfare.

Procedural due process was provided to Petitioners by the Police documenting the reasons for opposing the license and by the availability of administrative and judicial review which afforded Petitioners the full panoply of procedural safeguards. Specifically, Petitioners had notice of Police and neighborhood opposition, had the right to cross-examine the witnesses against them, and were given written reasons for the actions of the Police Department and the Board of Review. Furthermore, Petitioners had no legitimate claim of entitlement to a Dance Hall License, because the licensing decision was subject to the discretion of the municipality as delineated by statute.

Finally, no compensable taking occurred because Petitioners had no property interest in the mere expectation of a Dance Hall License which was denied for sound reasons of state law, and also because despite denial of the license, numerous other economically viable uses of their building remained available to Petitioners.

ARGUMENT

I.

THE THIRD CIRCUIT'S DECISION THAT THE LICENSING SCHEME PROVIDED SUBSTANTIVE AND PROCEDURAL DUE PROCESS IS CONSISTENT WITH THE DECISIONS OF THE SUPREME COURT AND OF THE OTHER CIRCUITS.

The Third Circuit correctly determined that the licensing procedure followed by the City of Philadelphia was not a *per se* violation of Petitioners' right to substantive due process.

The rationality of relying on the Police Department for a determination that the proposed dance

hall is a "safe and proper place" is clear from the particular facts of this case. The Police had independent, first-hand information which was itself sufficient cause for the Police to disapprove Petitioners' license application, and which also served to validate the community's stated reasons for its opposition to After Midnight.

Neither was the consideration of community sentiment in the way in which it occurred in this case a *per se* substantive due process violation. The three cases cited by Petitioners – *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 49 S.Ct. 50, 73 L.Ed. 210 (1928), *Eubank v. City of Richmond*, 226 U.S. 137, 33 S.Ct. 76, 57 L.Ed. 156 (1912), and *Geo-Tech Reclamation Industries, Inc. v. Hamrick*, 886 F.2d 662 (4th Cir., 1989) – are all distinguishable from the present case. *Eubank* involved an ordinance which on its face *required* the City to establish a building line upon petition of two-thirds of nearby property owners. In *Roberge* a zoning ordinance made the written consent of two-thirds of nearby property owners *mandatory* before the city would grant permission for the erection of a philanthropic home. The owners' decision was not constrained by any legislative standards nor was it subject to review. Finally, in *Geo-Tech*, the West Virginia Department of Natural Resources had discretion to deny a waste facility disposal permit on the basis that such a facility is "significantly adverse to the public sentiment."

All of these legislative schemes are crucially different from that in the present case where the ultimate and decisive licensing consideration is not the consent of neighbors, but instead is a police decision whether the proposed dance hall is "a safe and proper place for the purpose for which it shall be

used ..." 53 P.S. §4736. This decision is subject to full administrative and judicial review at which time the basis for the Police Department's recommendation could be examined, as it was in this case, to see if it is based on legitimate factors. In light of these procedural safeguards, resulting in the clear articulation of the basis for neighborhood opposition, Petitioners' claim that they were thwarted by arbitrary and irrational neighborhood sentiment must be rejected.

Turning to the question of procedural due process, the appellate rights afforded to Petitioners are well described by the Court of Appeals (24a-33a) and need not be restated here. Petitioners' claim that they had no notice of the standards utilized in license applications, or of the role played by the community in the licensing process. However, the Dance Hall Act itself obviously imposes a license requirement independent of other city codes. Moreover, the trial record showed that these same Petitioners were familiar with the Dance Hall License process, having been through it themselves on at least one prior occasion. Finally, as stated during trial, the recorded decisions of the Board of Review were available for Petitioners and their attorneys to inspect (190a, 192a). As stated in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982):

> "Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry or by resort to the administrative process." 455 U.S. at 498.

Petitioners argue that post-deprivation appeal rights are inadequate to cure an alleged due process violation where a pre-deprivation process is feasible.

This is a simplistic misstatement of the law. *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982), cited by Petitioners, involved a careful balancing of competing interests. Crucial factors were the length and finality of the deprivation in question. Here, the deprivation was of short duration. Petitioners' subsequent license reapplication for After Midnight was allowed, and was in fact successful. (7a-8a) Hence, *Armstrong v Manzo*, 380 U.S. 545 (1975), dealing with permanent termination of parental rights, is inapplicable.

As stated by the Third Circuit, Petitioners had no legitimate claim of entitlement to a license within the meaning of *Board of Regents v. Roth*, 408 U.S. 564 (1972). (25a-28a) Petitioners apparently have waived any objection to this holding as it was not raised in their Petition for Certiorari.

Finally, with respect to the argument on pages 16-18 of the Petition, it would seem sufficient at this time to point out that Down South was never in compliance with the Fire or Occupancy Codes. (44a) It is difficult to see how Petitioners believe that Down South was denied substantive due process when it did not at any relevant time satisfy the express statutory prerequisites for a Dance Hall License.

II.

THE THIRD CIRCUIT'S INTERPRETATION OF §1983 IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OF THE OTHER CIRCUITS.

Contrary to Petitioners' assertion, the Third Circuit did not hold that in order to recover under 42 U.S.C. §1983 a civil rights litigant must prove that a municipality acted with "improper motive" in enforcing a constitutionally infirm policy.

To begin with, the Court of Appeals quite clearly determined as a matter of law that the licensing scheme, on its face and as customarily applied, was not arbitrary or irrational. Having decided that the municipal policy was not constitutionally infirm, the Third Circuit went on to hold that on remand the jury must still decide the following question:

> "... whether the police in their recommendation knowingingly relied on unsubstantiated or irrational community objections, based on an improper motive, rather than some legitimate concerns such as traffic congestion, road safety, public safety, crime and noise and therefore whether or not the license was denied by the city on an improper basis." (42a)

Obviously, the improper motive to which the Court is referring is one which might exist in members of the community, not in the City or its employees.

The Court of Appeals found, as a matter of law, that the licensing scheme adopted by the City of Philadelphia was not constitutionally defective. Moreover, as pointed out above, the evidence at trial showed that the Police and the Board of Review were careful to document the reasons for the community's opposition. Petitioners had the benefit of numerous procedural safeguards during the review process. It is therefore impossible to conclude on the basis of this record that the official policy of the City of Philadelphia was one of "deliberate indifference" to the constitutional rights of license applicants. *See City of Canton v. Harris*, 489 U.S. 378 (1989) and *Pembaur v. Cincinnati*, 475 U.S. 469 (1986). The only remaining basis for liability would be a jury finding that individual City employees had deliberately abused their power, and in essence this is what the

jury must decide on remand. (The City stipulated that it would be responsible for the actions of the individual defendants. See note 2 on page 9 of the Petition for Certiorari.)

The Third Circuit opinion is therefore entirely consistent with *Monroe v. Pape*, 365 U.S. 167 (1961) and *Monell v. New York City Department of Social Services*, 436 U.S. 458 (1978) and their recent progeny, such as *City of Canton*, supra, and *Pembaur*, supra. The older Court of Appeals decisions cited on page 14 of the Petition for Certiorari predate *Monell*. Thus, not only are they factually distinguishable from the present case, but they represent an older and incomplete stage of the evolving legal contours of §1983 liability. We submit that the First Circuit case of *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir., 1982), *cert denied*, 459 U.S. 989 (1982), relied on by the Court of Appeals in our case, and the Third Circuit's own decision in *Bello v. Walker*, 840 F.2d 1124 (3rd Cir., 1988) give a sounder statement of the law in this area.

Certainly, mere negligence on the part of the Police in conducting their neighborhood survey is not actionable under §1983. *Daniels v. Williams*, 474 U.S. 327 (1986).

III.

THE COURT OF APPEALS CORRECTLY HELD THAT THE REFUSAL TO GRANT "AFTER MIDNIGHT" A DANCE HALL LICENSE DID NOT AMOUNT TO A TAKING.

Petitioners' Fifth Amendment argument pertains only to the "After Midnight" club and concedes that the Court of Appeals correctly stated the law. Nevertheless, Petitioners argue that the appellate court did not view the evidence in the light most favorable

to them, and that when so viewed it establishes that a taking did occur. Unfortunately for Petitioners, this is not the case.

Obviously, the Dance Hall License in question was never taken at all; it was simply not granted. Petitioners' own evidence showed that they had renovated the building for a variety of purposes besides dancing, among them, a restaurant, arcade, movie theater and skating rink. Their failure to obtain a Dance Hall License by no means prohibited these other uses. (21a) Thus, their contention that without dancing "After Midnight" was deprived of all "economically viable" uses is not sustainable.

Furthermore, as the Court of Appeals pointed out, Petitioners knew from the statute that they were required to have a Dance Hall License before beginning operations as a dance hall. Given this express statutory requirement, Petitioners' expectation that they had an absolute right to such a license was unreasonable. Disappointment of unreasonable hopes simply is not a taking under the Fifth Amendment. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

Petitioners also contend that they suffered a total, and therefore compensable, deprivation of their leasehold interests because the City's delay in granting a license caused them to fall behind in their rent and be evicted. This argument presumes that the initial denial amounted to a taking, which it did not. Moreover, the City did not evict Petitioners; they were simply unable to pay their rent. There is no authority, and Petitioners cite none, for the proposition that such a sequence of events amounts to a governmental taking.

CONCLUSION

For all of the above reasons, Respondent City of Philadelphia respectfully requests that this honorable Court deny the Petition for a Writ of Certiorari which has been filed in this case.

Respectfully submitted,

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